Supreme Court of Errors of Connecticut.

BALDWIN *v.* THE GREENWOODS TURNPIKE COMPANY.

A traveller sustaining an injury by reason of a defect in a highway attributable to the negligence of the corporation bound to maintain it, is not barred of his right to recover by reason of the fact that on his own part an accident has contributed to the injury, if it is in no way attributable to his own negligence.

And it does not affect the case that the accident occurred upon another road over which the defendants had no control.

It is not necessary that ordinary care should have been exercised by the plaintiff at the very time and place of the injury, if such accident has rendered the exercise of such care impracticable.

The plaintiff's horse, driven by his servant in his carriage along a public highway, in the exercise of ordinary care, became frightened by the breaking of the carriage in consequence of a defect for which no negligence was attributable to the plaintiff, and ran furiously, throwing out the driver, soon after which he left the highway and passed over private property to and upon a turnpike road, where, still running furiously, he fell over the side of a bridge by reason of a defect in the railing and was injured, such defect being attributable to the negligence of the turnpike company. *Held*, that the turnpike company was liable for the injury.

A traveller is not responsible for a secret defect in his carriage or harness, where there has been no want of ordinary care on his part in relation to it.

CASE, for an injury from a defective bridge of the defendants, a turnpike company; brought to the Superior Court in Litchfield county, and tried to the jury on the general issue, before GRANGER, J.

On the trial it was proved and admitted that one Hartrick was driving the horse of the plaintiff on a town road in Norfolk, in a buggy belonging to the plaintiff, and that while so driving, being on slightly descending ground, through some secret defect, in relation to which neither the plaintiff nor Hartrick was in fault, the clip or iron band which attached the end of one of the shafts to the down axle, broke and let the shaft with the cross-bar of the shafts upon the horse's heels. The horse kicked and began to run, and Hartrick in attempting to rein him to one side of the road, was himself thrown out of the buggy. The horse then, freed from any control of a driver, ran more swiftly, went around a school-house standing by the side of the town road, and coming out again upon the road, ran into a large two-horse lumber-wagon standing near the road-side. By this collision the other shaft was broken from the buggy, and the horse, with only the shafts and crossbar attached to him, continued to run furiously down a hill, and ran upon the defendants' turnpike and upon a bridge of the defendants, over the side of which he fell and was so injured as to become worthless.

The horse was on the defendants' road only about thirty feet before coming to the bridge, and only about fifty feet upon their road at all. The place where the clip broke was on a town road over which the defendants had no control, and for which they were not responsible, and was some eighty or ninety rods from the defendants road. The place where Hartrick was thrown out was on the town road, and was some seventy or eighty rods from the defendants road. After Hartrick was thrown out the horse was wholly free from any guidance whatever, and ran in the excited and frightened manner above described. It was also admitted that when the horse ran around the school-house as above stated, he went outside of the limits of any highway.

Hartrick testified that he could have controlled the horse if he had not been thrown out of the buggy. There was other evidence tending to prove the same thing. There was no evidence whatever to the contrary.

The plaintiff introduced evidence tending to show, and claimed that he had proved, that the defendants' bridge was defective for want of a suitable railing, and that the injury would not have happened if there had been a sufficient railing on the south side of the bridge.

Upon these facts the defendants claimed that the plaintiff was not entitled to recover, because he had not shown that he was in the exercise of due care at the time the injury happened, and that from the nature of the circumstances he was precluded from exercising such care, and asked the court in writing to charge the jury "that in order to entitle the plaintiff to recover, he must show that he was in the exercise of due care *at the time* the injury was received; and that if he did not *at the time of the injury* exercise such care, even though prevented by accident from so doing, he could not recover."

The judge read the first part of this request in his charge, and stated to the jury that that was the law. He then read the remainder, and said to the jury, "I do not understand that the law goes to this extent. You are to look at all the circumstances under which Hartrick was placed at the time, and if you find that he did all that a reasonable and prudent man could do, situated as he then was, it will be in my judgment a sufficient compliance with the rule of the law as I have stated it to you."

The court also charged the jury that in order to entitle the

plaintiff to their verdict, they must find that the defendants' bridge was defective for the want of a sufficient railing, and that the injury to the horse occurred through such want of a railing.

The defendants further requested the court, in writing, to instruct the jury, "that if they should find that the injury complained of happened to the horse while he was out of the reach and control of the driver, running at large, wildly, excited by fear, and under no guidance, the plaintiff was not entitled to recover." The court did not so instruct the jury, but said to them that this request appeared to be but an amplification of the previous one, upon which he had already spoken, and that if they should find that the injury resulted from the negligence of the defendants in not providing a suitable railing to their bridge, and that the plaintiff's driver was doing all that a reasonably careful man could do under the circumstances of his situation, the simple fact that the horse was free from the control of the driver at the moment of the injury would not preclude the plaintiff from a right to their verdict.

The defendants also asked the court to charge the jury, "that as the efficient procuring cause of the injury happened wholly off their road and on a town highway, they were not liable; and that as it appeared that the horse when going around the school-house went entirely outside the limits of any highway, the defendants for such reason were not liable." The court did not so instruct the jury, but charged them that if the injury to the plaintiff's horse happened, as claimed by him, through the want of a sufficient railing on the defendants' bridge, the fact that the accident, which in the succession of events was the first cause leading to such injury, happened outside the limits of the defendants' road, would not prevent his recovery; nor the circumstance that the horse in running went entirely off the limits of any highway.

The jury rendered a verdict for the plaintiff, and the defendants moved for a new trial for error in the charge of the court and in the refusal to charge as requested.

G. C. Woodruff and *Andrews*, in support of the motion.—1. The rule is that a plaintiff seeking to recover for an injury arising from a defective highway or bridge, must show that he exercised due care to avoid it: *Birge* v. *Gardner*, 19 Conn. 507; *Weeks* v. *Conn. & R. Island Turnpike Co.*, 20 Id. 134; *Neal* v. *Gillet*, 23 Id. 437, 444; *Fox* v. *Town of Glastonbury*, 29 Id. 204; Angell on Highways, § 345; 1 Hilliard on Torts, ch. 4, § 5.

2. This rule requires that care be exercised at the very time when, and place where, the injury happens: 1 Hilliard on Torts, ch. 4, § 2; *Calkins* v. *City of Hartford*, 33 Conn. 57; *Thorp* v. *Town of Brookfield*, 36 Id. 320; *Bronson* v. *Town of Southbury*, 37 Id. 199; *Congdon* v. *City of Norwich*, Id. 414; *Landolt* v. *City of Norwich*, Id. 615; *Hyde* v. *Jamaica*, 27 Verm. 443; *Palmer* v. *Andover*, 2 Cush. 600; *Davis* v. *Dudley*, 4 Allen 557; *Blodgett* v. *City of Boston*, 8 Id. 237; *Titus* v. *Northbridge*, 97 Mass. 258; *Moore* v. *Abbott*, 32 Maine 46; *Farrar* v. *Greene*, Id. 574; *Moulton* v. *Sanford*, 51 Id. 127.

3. The charge finds no support in those cases which decide that a plaintiff may recover even though an accident contribute to the injury. All those cases require that due care be exercised at the very time of the injury: *Hunt* v. *Pownal*, 9 Verm. 411; *Clark* v. *Barrington*, 41 N. H. 44; *Winship* v. *Enfield*, 42 Id. 197; Shearm. & Redf. on Negligence, § 416.

4. The charge given, that the accident happening outside the limits of the defendants' road did not prevent the plaintiff's right of recovery, was wrong. It is found that the defendants were not responsible for the town road: *Rowell* v. *City of Lowell*, 7 Gray 100; *Kidder* v. *Dunstable*, Id. 104; *Richards* v. *Enfield*, 13 Id. 344.

Graves and *E. W. Seymour*, contrà, cited *Clark* v. *Barrington*, 41 N. H. 44; *Tucker* v. *Henricker*, Id. 317; *Winship* v. *Enfield*, 42 Id. 197; *Hunt* v. *Pownal*, 9 Verm. 411; *Kelsey* v. *Glover*, 15 Id. 708; *Palmer* v. *Andover*, 2 Cush. 600; *Mandershied* v. *Dubuque*, 10 Am. Law. Reg. N. S. 526; Angell on Highways, §§ 295, 299; Shearm. & Redf. on Negligence, §§ 416 and note, 417.

MINOR, J.—A servant of the plaintiff was driving his horse before a carriage on a public highway in the town of Norfolk, over which the defendants had no control, and which was then without defect. While so driving, from some secret defect, and without fault on the part of the plaintiff or his servant, the iron band attaching the end of one of the shafts to the axle broke, and the shaft, with the cross-bar, fell upon the horse's heels. The horse, very much excited and frightened, at once commenced to run, and in a short time the servant, in efforts to restrain him, was thrown from the carriage; after which the horse, with great speed and without control, ran from the public highway upon private property outside

of the limits of any highway, and from thence upon the defendants' turnpike, passing on to the turnpike at a point about thirty feet distant from one of the defendants' bridges, which they were bound to keep in repair. The horse, still excited and without control, continued his course on the turnpike, and on to the bridge, and having passed about twenty feet thereon, was injured by reason of falling from the side of the same on account of a defect in the railing, which the defendants had carelessly and negligently failed to keep in proper repair.

The plaintiff's servant was thrown from the carriage, while on the public highway, and at a place about eighty rods distant from the turnpike.

There is nothing in the case showing that the horse was vicious or unfitted to encounter the risks of ordinary public travel, nor that the plaintiff or his servant was negligent in not knowing of the secret defect in the carriage, nor that there was any negligence or want of reasonable care on the part of either, which at all contributed to the injury. But it does appear that the defendants' negligence in not keeping the railing of their bridge in proper repair, combined with an accident for which neither party was responsible, was the cause of the injury.

Under these circumstances who ought to sustain the loss, the plaintiff or the defendants?

The defendants did not seriously urge the secret defect as absolving them from liability, and, as we think, very properly; for a traveller cannot be regarded as an insurer of the strength of his carriage and harness at all times and under all circumstances. The most that can be required of him is, that he exercise ordinary care and prudence with reference to them in their purchase and use, and in the attention necessarily to be given to them in order that he may pass safely over highways and bridges not in a defective condition. In this regard it appears that the plaintiff performed his entire duty.

While essentially admitting this, the defendants claim that the plaintiff, seeking to recover damages for the injury, must show that he exercised due care to avoid it at the *very time when*, and the *place where*, the injury happened; and they deny his right to recover in this case because by accident he was, *then* and *there*, prevented from exercising any care, and consequently contributed to his own injury.

This claim brings into consideration the question, whether the defendants are relieved from liability for an injury caused by their negligence, combined with an accident for which no responsibility attaches to either party.

The plaintiff performed no negligent act, nor can we see that he failed to do anything by the performance of which the injury might have been avoided; he was providentially prevented from acting. This falls far short of that contributory negligence which excuses the defendants.

We may conjecture that if the servant had remained with his horse and continued in control of him, the injury might have been avoided.

The failure of a traveller to be continually present with his team up to the time and place of injury, when that failure proceeds from some cause entirely beyond his control, and not from any negligence on his part, ought not to impose upon him the loss from such injury, particularly when the direct cause of the same is the negligence of some other party; the loss should be charged upon the party guilty of the first and only negligence with reference to the matter.

In our judgment the proper rule is this:—If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable.

Nor will the fact that the horse of the plaintiff was uncontrolled for some distance before the injury, change or in any way affect the liability of the defendants.

The statute laws of our state impose upon towns and corporations the duty to keep their highways and bridges with sufficient railings in suitable repair. This is a positive duty, and the safety of the travelling community requires that it should be rigidly enforced. When they have been almost criminally remiss in the performance of this duty, and injuries happen from the insufficiency of their bridges or highways, they ought not to escape the consequences of such injuries unless upon the plainest principles of law. While we agree that the defendants were not bound to provide such railings for their bridges as would restrain all uncontrolled or unmanageable animals passing over the same, we yet hold them to their duty with reference to sufficient repairs and to their liability for injuries occasioned by want of the same.

The questions arising in this case have been before the courts of some of our sister states, and the weight of authority seems to be in favor of the result to which we have come.

In Maine it has been holden that a town or corporation is not liable under circumstances similar to those of the present case.

In Massachusetts there have been decisions somewhat conflicting, but the law seems now to be settled that the defendants are holden except when the team becomes unmanageable outside of the limits of their highway, or from fright at some object which is not a defect in the same.

In Vermont the adjudications lead logically to the conclusions to which we have come. In *Hunt* v. *Pownal*, 9 Vermont 411, the learned Judge REDFIELD, in giving the opinion, says:—"In every case of damage occurring on the highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young, or restive, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is against these constantly occurring accidents that towns are required to guard in building highways. The traveller is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. If he could always be sure of this he would not require any further guaranty of his safety unless the road were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road conspiring with some accidental cause, the defendants are liable."

The charge of the judge in the court below was substantially in accordance with these views. A new trial is therefore not advised.

We have examined this subject so extensively, within the last few years, ante vol. 7, N. S. 785; vol. 8, Id. 81, that we should scarcely be excused for going into any extended discussion here. The decision, in the principal case, seems to us to have adopted the sound and sensible view, upon two points, in regard to which there are a considerable number of cases, of high authority, in direct conflict with the rule here declared.

1. That the defendants are responsible for an injury happening upon their road, through their own negligence, or the defective construction or repair of their road, and which it was their duty to remedy, and where such injury would not have occurred, if the defendants had done their duty in that respect. In *Davis* v. *Dudley*, 4 Allen 557, it was decided, that no recovery could be had, under a state of facts very similar to those in the principal case. The ground

there urged, against the recovery, by the learned judge is, chiefly, that the plaintiff could not have been in the exercise of proper care at the time the accident occurred. But that is matter of fact, in regard to which experienced persons might differ; so much so that it must be regarded as proper to be submitted to the jury, as it was in the principal case. And the argument, which has been sometimes urged, in similar cases, that highways are not required to be so built, or repaired, as to insure the safety of runaway teams, is more plausible than sound. No one claims this, but only that highways shall be kept in such condition as to be safe for ordinary travel; and if damage occurs, through any deficiency in that respect, even where, by accident, and without the fault of the driver or owner, teams have broken away from immediate control, the corporation cannot be excused. But, of course, if the accident was through the fault of the owner or driver, or the team broke loose for want of proper caution or skill, or was not a fit team to bring upon the highway, or there was any other fault of the owner or driver contributing directly to the damages, there can be no recovery: *Howard* v. *North Bridgwater*, 16 Pick. 189.

2. The other point seems equally unquestionable and very nearly connected with the one just alluded to; viz.: that where the damage is the combined result of accident and the defectiveness of the highway, there is no reason why a recovery should not be had, provided there was no fault on the part of the plaintiff or his servants. This view seems to be maintained in *Palmer* v. *Andover*, 2 Cush. 600. But some of the late cases seem to hold that the damages must result solely from the defectiveness of the highway, and that towns or turnpike companies are not responsible for the consequences primarily caused or set in motion by some accidental occurrence: *Moore* v. *Abbott*, 32 Me. 46; *Moulton* v. *Sandford*, 51 Id. 127, Chief Justice APPLETON dissenting. We admit, of course, that if the primary cause of the damage was some defect in the plaintiff's travelling apparatus, or anything else for which he is responsible, and which he might have guarded against by the proper degree of care and watchfulness, he cannot recover, because he was himself in fault, in regard to a matter directly contributing to the loss: *Rowell* v. *Lowell*, 7 Gray 101. But we trust the profession and the courts will finally come to the conclusion, that travellers are not to be subjected to that stringency of watchfulness, in regard to the perfect security of their travelling equipage, which we require of passenger carriers, before they venture abroad, or else forfeit all right to demand secure highways. I. F. R.

Supreme Court of Errors of Connecticut.

PERRY *v.* THE SIMPSON WATERPROOF MANUFACTURING CO.

Upon a former trial between the same parties the counsel for the defendants, a corporation, had admitted their incorporation and that certain persons were officers of the company at a certain time, and the plaintiff had therefore introduced no proof upon these points. A second trial was had, previous to which the defendants gave the plaintiff notice that they withdrew their admission of the former trial. Upon the second trial the plaintiff, having given notice to the defendants to produce the records of the corporation in court, which they neglected to do, offered in evidence the admission of their counsel upon the former trial. *Held*, 1. That